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October 13, 1998

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Magalie R. Salas, Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

9252


Re: MM Docket No. 97-234

Dear Ms. Salas:

Transmitted herewith, on behalf of The National Translator Association, are an original and eleven (11) copies of The National Translator Association's Petition for Reconsideration of the Commission's First Report and Order in the above-referenced proceeding, *In the Matter of Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, FCC 98-194 (August 18, 1998).

Any questions and copies of all correspondence relating to this filing should be directed to the undersigned

Very truly yours,


Joseph P. Benkert

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OCT 13 1998

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Implementation of Section 309(j))	MM Docket No. 97-234
of the Communications Act)	
-- Competitive Bidding for Commercial)	
Broadcast and Instructional Television Fixed)	
Service Licenses)	
)	
Reexamination of the Policy)	GC Docket No. 92-52
Statement on Comparative)	
Broadcast Hearings)	
)	
Proposals to Reform the Commission's)	GEN Docket No. 90-264
Comparative Hearing Process to)	
Expedite the Resolution of Cases)	

PETITION FOR RECONSIDERATION

The National Translator Association, by its attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. §1.429, hereby petitions the Commission for reconsideration of its First Report and Order in MM Docket No. 97-234, *In the Matter of Implementation of Section 309(j) of the Communications Act—Competitive Bidding for Commercial Broadcast and Instructional Television Fixed Service Licenses*, FCC 98-194 (August 18, 1998)(the "*First Report and Order*")¹.

I. Introduction.

The auction rules adopted in the *First Report and Order* with respect to the Translator Services, including the anti-collusion rules, violate Congress' charge to the Commission, and can

¹ The *First Report and Order* was released on August 18, 1998, but was not published in the Federal Register until September 11, 1998. Thus, pursuant to Section 1.4 and 1.429 of the Commission's Rules, 47 C.F.R. §§1.4, 1.429, this Petition is timely filed.

only delay the initiation of new broadcast service to Americans living in rural locations.² The Rules the Commission has adopted appear reasonable and workable in the context of channel-allotted services, as well as mature non-channel-allotted services in which relatively few applications are filed. The application of these new rules to the non-allotted translator services—the non-allocated services in which the greatest number of applications are typically filed in response to filing windows—will also frustrate and delay the Commission licensing process and the provision of needed service to rural Americans. Translator stations should instead be treated in the manner of major change applications for full-service stations.³ See the NTA's proposed revisions to Sections 73.5002(c) and (d) of the Rules at Section IV hereof

II. The Anti-Collusion Rules, as Applied to the Translator Services, Conflicts With Other FCC Rules and Violates Congressional Intent.

The Commission's Rules provide translator station applicants flexibility to resolve mutual exclusivity through engineering and technical solutions as well as negotiation. In the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 251 (1997) ("Budget Act"), Congress directed the Commission that the Act does not relieve the Commission of its obligation to continue to use engineering solutions and other means to avoid mutual exclusivity. The auction anti-collusion rules the Commission has adopted, however, prevent applicants from using such means to resolve mutual exclusivity, by denying applicants an opportunity to employ them. (The application of the anti-collusion rules to the Translator Services will also seriously delay the

² The "Translator Services" include the Television Translator and FM Translator Services authorized pursuant to Part 74, Subparts G and L, respectively, of the Commission's Rules, 47 C.F.R. §§74.701, *et seq.*, 74.1201, *et seq.*

³ Low Power Television ("LPTV") stations are also authorized and operated pursuant to Part 74, Subpart G of the Rules, 47 C.F.R. §§74.701, *et seq.* of the Rules. LPTV and TV Translator stations operate under the same rules in all respects relating to mutual exclusivity, and for purposes of this Petition are one and the same except as specifically noted. For the purposes of resolving application conflicts, the same considerations apply to FM Translators.

proper growth of new TV and FM services to Americans living in rural areas, contrary to the intent of Section 307(b) of the Act, 47 U.S.C. §307(b).)

A. The Commission's Translator Rules provide Translator Applicants Unique Flexibility to Resolve Mutual Exclusivity.

Unlike the other broadcast services, translator applicants are permitted to avoid mutual exclusivity (predicted prohibited interference) with pre-existing stations and other new applicants by demonstrating in their applications that there will be no actual interference due to terrain shielding.⁴ Translator applicants are permitted to avoid mutual exclusivity even by one or both of the stations *agreeing to accept interference, i.e.,* by negotiation.⁵ Indeed, even where a showing of terrain shielding is involved, the Commission's preference has been for the issue of potential interference to be resolved through negotiation, with the applicant(s) submitting consent letters from the stations or applicants to which interference is predicted. Translator applicants are also permitted to avoid mutual exclusivity through the use of channel offsets to improve the desired-to-undesired signal ratio at a protected or proposed station's contours.⁶ It is common for the Commission to waive certain taboos, such as the taboo on 15-channel spacing for collocated LPTV and translator stations, preferably with the negotiated consent of the applicant for licensee of the lower channel.

In the case of window filings, there can generally be no prior knowledge of applications filed by other parties. If two or more mutually exclusive applications are filed, engineering or other solutions must of course be devised after the applications are filed.

⁴ See Section 74.703(a) of the Commission's Rules, 47 C.F.R. §74.703(a).

⁵ *Id.* In the *DTV Sixth Report and Order*, the Commission approved of translator and LPTV applicants agreeing to accept interference as a regular procedure rather than by waiver. *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 7 CR 994, para. 145 (b). See 47 C.F.R. 74.703(a).

⁶ See Section 74.705(d)(1) of the Commission's Rules, 47 C.F.R. §74.705(d)(1).

B. Congress Maintained the Status Quo Regarding the Commission's Obligation to Employ Means to Avoid Mutual Exclusivity.

As stated, the applicable service regulations have provided translator applicant's a variety of means to avoid mutual exclusivity. These means include employing engineering solutions and negotiation.

Section 309(j)(6)(E) of the Communications Act, 47 U.S.C. §309(j)(6)(E), directs the Commission, in the interpretation of the Act's auction provisions:

Nothing in this subsection, or in the use of competitive bidding, shall . . . *relieve* the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings.

Emphasis added. The Conference Committee also directed:

Subsection 3301(a) amends section 309(j) of the Communications Act, which grants to the FCC authority to use auctions as a means of granting licenses for radio-based services. The subsection requires the FCC to employ a system of competitive bidding if presented with mutually exclusive applications for the use of spectrum. *The Committee makes clear, however, that the FCC must continue to seek solutions to avoid a finding of mutual exclusivity.*

H. Report No. 105-149, 105th Cong., 1st Sess. At 567. (1997)(Emphasis added). Congress thus intended to continue the status quo of avoiding mutual exclusivity through, *inter alia*, engineering solutions and negotiation.

C. The Auction and Anti-Collusion Rules Do Not Afford Translator Applicants an Opportunity to Resolve Mutual Exclusivity.

The Commission has found:

[Community-based Translators] are generally not affiliated with commercial broadcasters, are non-profit, non-profitable, or only marginally profitable, serve small rural communities, and are supported financially of the residents of the communities served. Even those translators that are nominally for profit often sell no advertising and have no way of requiring viewers who receive their signals to pay a subscriber fee. These translator licensees, as a whole, are different from other classes of commercial regulatees because they have no advertising revenue

and usually have no mechanism for enforcing payment from members of the public who benefit from their services.

Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year, 10 FCC Rcd. 12759, 78 RR 2d 210, 1995 Lexis 4120, para. 16 (1995). When applicant's such as these file applications for new translator stations to serve their towns and hamlets, they often have no idea whether similar applicants in their predicted interference area will also be filing applications, and if so, what their technical proposal will be.⁷

Translator applicants simply do not know what mutually exclusive applications will be filed until the Commission identifies by public notice applications which have been filed and are and are not mutually exclusive. Thus, they cannot take advantage of the aforementioned alternatives for resolving mutual exclusivity until after the applications are filed.

The Commission's auction and anti-collusion rules prohibit translator applicants from communicating with other applicants, or amending their applications in a manner which would allow them to avoid mutual exclusivity, after their short-form applications are filed. *See* 47 C.F.R. §§1.2105(c), 73.5002, 73.3525(l). The Commission should modify the auction and anti-collusion rules on reconsideration, to provide translator applicants the same opportunities as major change applicants to resolve application conflicts, and to amend their applications accordingly. *See* 47 C.F.R. §73.5002(c) and (d).

At a minimum, The Commission should continue to permit applicants in the Translator Services to make minor change amendments (changes which do not involve a change of channel

⁷ LPTV stations which originate programming may be operated on a for-profit basis. The number of these stations is relatively small (NTA understands that fewer than 20% of the combined total of TV Translator and LPTV Stations are LPTV Stations. The prejudice to translator stations and rural populations from application of the anti-collusion rules is disproportionately great.

and/or a new service contour which exceeds the original service contour).⁸

III. The Anti-Collusion Rules, As Applied To Translator Applicants, Will Not Serve Their Stated Purpose.

In the *First Report and Order*, the Commission states:

The Commission adopted the anti-collusion rule to both prevent and to facilitate the detection of collusive conduct, thereby enhancing the competitiveness of the auction process and post-auction market structure.

First Report and Order, para. 155 (emphasis added). There is no “competitiveness of the auction process and post-auction market structure” to enhance, however.

As the Commission has found, community-based translators are generally not affiliated with commercial broadcasters, are non-profit, non-profitable, or only marginally profitable, serve small rural communities, and are supported financially by the residents of the communities served. See, *Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year*, 10 FCC Rcd. 12759, 78 RR 2d 210, 1995 Lexis 4120, para. 16 (1995). Other translator’s are licensed to county governments, special tax districts, or licensees of full-service, often non-commercial educational, broadcast stations.

Translators are operated on a non-profit basis, and by licensees such as these, because it is mandated by the Copyright Act of 1976, as amended. Section 111(a)(5) of the Copyright Act provides that translator’s are exempt from copyright liability provided that they operate on a not-for-profit basis.

The Commission’s rules contain complementary provisions. See 47 C.F.R. §§74.731(f), 74.1231(g). By law, translators are operated on a non-profit basis. In addition, support for community-based translators from higher-income households in the translator service are subject

⁸ The NTA has no objection to one party making a payment to another for the actual cost of implementing an engineering solution; but neither party should be unjustly enriched.

to being siphoned-off by satellite-delivered services. This leaves a smaller population to support the translator, the portion of the population which can least afford to pay for service.

Under these circumstances there will be no “competitiveness of the auction,” or of the post-auction market structure, to be enhanced.⁹ Even if, as a matter of public policy, Congress had wanted to raise federal revenues from auctioning facilities to community based translator applicants, rural counties and tax districts, and non-profit organizations; it would not earn significant revenues.

The likely outcome of application of the anti-collusion rules to translators is that applicants whose applications turn out to be mutually exclusive will not bid, but will instead re-file their application in a subsequent filing window. They will hope to avoid mutual exclusivity the next time around. The result of this will be the overburdening of the Commission’s translator application processing resources, and the frustration of needed new service to rural areas.¹⁰ The Commission should avoid this result by modifying the anti-collusion rules on reconsideration, to provide translator applicants the same opportunities as full-service station major change applicants to resolve application conflicts, and to amend their applications accordingly. *See* 47 C.F.R. §73.5002(c) and (d). *See* the NTA’s proposed revision of these provisions at Section IV hereof.

⁹ The Translator Services do not enjoy the robust post-licensing market that Part 73 stations enjoy. The infrequent translator station assignments involve very modest prices.

¹⁰Section 309(j)(3) of the Act, 47 U.S.C. §309(j)(3), provides that in designing a system of competitive bidding for the broadcast services, the Commission shall seek to promote, *inter alia*, the objective of: “the development and rapid deployment of new technologies, products, and services for the benefit of the public, *including those residing in rural areas, without administrative or judicial delays. . .*” The Commission should first assure that *existing* technologies and services are deployed to the public residing in rural areas without administrative delays. The translator services, intended to retransmit signals of full service broadcast stations to areas where direct reception of such services is unsatisfactory due to distance or intervening terrain, are by definition services to rural populations. *See* 47 C.F.R. §§74.731(a) and 74.1231(a).

IV. Application of the Major Modification Rules to Translators Would Not Impede Administrative Efficiency.

The Commission can apply the full-service station major modification rules to translators without sacrificing administrative efficiency. This can be easily accomplished by amendment of Sections 73.5002(c) and (d) of the Rules, 47 C.F.R. §§73.5002(c) and (d), as follows:

(c) Applicants in all broadcast service or ITFS auctions will be subject to the provisions of 47 C.F.R. 1.2105(b) regarding the modification and dismissal of their short-form applications. Notwithstanding the general applicability of Section 1.2105(b) to broadcast and ITFS auctions, applicants who file mutually exclusive major modification applications, ~~or~~ mutually exclusive major modification and new station applications, *or mutually exclusive new and/or major change Television Translator, LPTV or FM Translator applications*, will be permitted to make amendments to their engineering submissions following the filing of their short form applications so as to resolve their mutual exclusivity.

(d) The prohibition on collusion set forth in 47 C.F.R. §1.2105(c), which becomes effective upon the filing of short form applications, shall apply to all broadcast services or ITFS auctions. Notwithstanding the general applicability of Section 1.2105(c) to broadcast and ITFS auctions, applicants who file mutually exclusive major modification applications, ~~or~~ mutually exclusive major modification and new station applications, *or mutually exclusive new and/or major change Television Translator, LPTV or FM Translator applications*, will be permitted to resolve their mutual exclusivities by means of engineering solutions or settlements during a limited period after the filing of short-form applications. Such period will be further specified by Commission public notices

Given the number of applications which can be expected in this non-allocated service, and the resulting application daisy-chains, modification of Section 73.5002(c) and (d) of the Rules as proposed will improve administrative efficiency.

The procedures which the National Translator Association advocates is the opening of filing windows for new applications, followed by public notice of mutually exclusive applications. The only review of the grantability of a mutually exclusive application would be a review of waiver requests. In these waiver-intensive services with complex rules and primarily *pro se* applicants, firm decisions on waiver requests prior to the auction would be appropriate. The public notice of mutually exclusive applications would trigger a 90 day application

amendment period, during which applicants would be permitted to amend their applications to resolve the mutual exclusivities. The amendments which could be filed would include submission of terrain shielding showings, waiver requests, negotiated agreements to accept interference, and modifications of facilities to modify the channel or channel offset, effective radiated power, or even the transmitter site; so long as the mutual exclusivity would be resolved without creating any new mutual exclusivity, and essentially the same community (population) would be served.¹¹

After 90 days, the Commission would release a public notice including an updated list of mutually exclusive applications. Applicants who had not resolved their mutual exclusivities through engineering solutions or negotiation would proceed to auction.¹²

To protect against abuse of the application process, applicants would be prohibited from paying or accepting consideration in connection with the resolution of mutual exclusivities. However reimbursement for the increased costs of modified facilities necessary to avoid interference, or for the retention of engineering consultants to advise an applicant with respect to engineering solutions to mutual exclusivity, would be permitted.

Finally, in view of (i) the nature of translator licensees, (ii) the fact that individual licensees and the officers of entity-licensees typically have other full-time employment, and (iii) that translator licensees are rarely represented by consulting engineers or attorneys, the filing periods for petitions to deny translator applications and responses thereto, would not be reduced as in the *First Report and Order*. Filing of petitions to deny should be permitted within 15 days

¹¹ A channel modification would constitute a major change in the Translator Services. Given that an applicant would have filed during a window open to all potential candidates no party would be prejudiced by permitting channel modifications.

¹² Section 74.703(a) of the Rules should be modified to permit written agreements to accept interference to be filed subsequent to the filing of applications.

of the FCC Public Notice proposing the application for grant. Applicants should be permitted to file oppositions within 15 days after the Petition to Deny is filed. This procedure should best serve the interests of expediting new service to the rural public while efficiently utilizing the Commission's resources. This procedure should allow the Commission to open windows for new translator stations approximately every six months.

V. Conclusion.

The auction and anti-collusion rules adopted by the Commission for the translator services is inconsistent with Congressional intent that the Commission continue to pursue engineering solutions, negotiation and other alternatives to mutual exclusivity; and that it speed service to rural areas. It is also inconsistent with good public policy, given the *de jure* non-profit nature of the translator services.

Translators should be treated in the same manner as full service major change applications. They should be permitted to negotiate resolution of mutual exclusivity and the implementation of engineering solutions to mutual exclusivity (including some solutions which would otherwise constitute major amendments).

Respectfully submitted,

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